



Supreme Court, U. S.

F I L E D

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No. 96-1925

In the Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR INC.,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and its affiliated
LOCAL UNION 786,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Section 302(a) of the Labor Management Relations Act forbids an employer to pay or agree to pay the union officials who represent its employees. Section 302(c)(1) exempts payments to an official who is a current or former employee if the payments are made "by reason of" the official's past or present "service as an *employee*." Sitting *en banc* a divided Third Circuit overruled its own precedent and became the first court of appeals to accept the contention that this exemption extends to the provision of current, full-time wages to full-time union officials who no longer perform any work for the employer. According to the majority, the exemption applies simply if union officials were formerly employed by the payor and if the payments were provided for in a collectively bargained agreement.

This case thus presents the following question:

- Whether section 302(c)(1) permits an employer to pay or agree to pay the current wages of full-time union officials who are former employees of the employer but who no longer perform any work for the employer.

RULE 29.6 STATEMENT

Caterpillar Inc., a corporation, has no parent companies but has the following non-wholly owned subsidiaries:

- Advanced Filtration Systems, Inc.
- AO NOVOTRUCK
- Aquila Mining Systems Ltd.
- Caterpillar Elphinstone Pty. Ltd.
- Bio-energy Partners
- Cyclean, Inc.
- F.G. Wilson, L.L.C.
- Lexington Real Estate Holding Corp.
- Peoria Medical Research Corp.
- Rapisarda Industries S.r.L.
- RR-1 Limited Partnership
- UNOC Equipment and Supply, L.L.C.

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OPINIONS BELOW

The majority and dissenting opinions of the court of appeals, sitting *en banc*, Pet. App. at 1a, are reported at 107 F.3d 1052. The *sua sponte* order of the court of appeals setting this case for rehearing *en banc*, Pet. App. at 45a, is unreported. The opinion of the district court, Pet. App. at 47a, is reported at 909 F. Supp. 254.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on March 4, 1997. Pet. App. at 44a. Caterpillar invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) in a Petition filed on June 2, 1997. This Court granted the Petition on September 29, 1997.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. § 186 (1994 & Supp. I 1995), is reproduced in the Appendix to the Petition. Pet. App. at 64a.

STATEMENT OF THE CASE

This case concerns the UAW's demand that Caterpillar continue the payment of wages to former employees who have left the Company's employ to become full-time union officials. In that capacity, they perform no work for Caterpillar but exclusively represent the UAW and Caterpillar workers. In this declaratory judgment action, Caterpillar contends that these wage payments violate section 302(a) and (b) of the Labor Management Relations Act, 1947 [hereinafter LMRA], 29 U.S.C. § 186(a), (b) (1994 & Supp. I 1995). A divided Third Circuit, sitting *en banc*, overruled its own precedent and upheld the legality of the payments.

1. *The UAW's Historical Representation of Caterpillar Employees.* For many years, the UAW has represented Caterpillar's production and maintenance employees at a number of manufacturing and related facilities around the United States. Appendix filed in the Court of Appeals [hereinafter "Cir. App."] at 44. Caterpillar and the UAW have been parties to a series of contracts known as the "Central Agreement" and local supplements covering facilities in Illinois, Tennessee, Pennsylvania, and Colorado. *Id.* at 37, 41. The York, Pennsylvania facility, regarding which this particular suit arose, has been covered by the Central Agreement since 1954. *Id.* at 41.

Under the Central Agreement, employees may present grievances to their supervisors during the work day. Joint Appendix [hereinafter "J.A."] at 19. "Stewards" and "plant grievance committeemen," who are active employees of Caterpillar and who also represent their fellow employees as needed in the presentation of grievances, are called upon during the work day to meet with the grievant and discuss the grievance with management. J.A. 43-44; Cir. App. at 166, 177-78. The regular wages of the employee-representative are not docked for time spent in the grievance procedure, and he may take time to "discuss the grievance" with management "without loss in pay for regularly scheduled hours." J.A. at 44.

2. *The Role of Full-Time UAW Officials.* In addition to full-time employees who serve as union representatives on an "as needed" basis, other UAW officials are also involved in the grievance procedure. For example, at York the Central Agreement recognizes a "Chairman of the Grievance Committee," an "Alternate Committeeman" and an "International Representative." J.A. at 5-6. The Chairman and his alternate, *inter alia*, represent the Union in the final "steps" of the grievance procedure, and consult with

the International on the disposition of grievances. J.A. at 44-47; Cir. App. at 609, 637. The Chairman also serves on the Local Bargaining Committee and the Central Bargaining Committee. Cir. App. at 183-84, 629. At other facilities, the Central Agreement recognizes a number of "full-time Committeemen," a "Grievance Committee Chairman," a "Bargaining Committee Chairman" and a "President of the Local." J.A. at 3-10.

All of these officials are full-time representatives in the employ of the UAW.¹ J.A. at 13-18; Cir. App. at 166-67. International Representatives are appointed by the International and may be on leave of absence from Caterpillar or elsewhere. J.A. at 3-18, 36; Cir. App. at 168. Other full-time officials are elected by the members. Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2-3, 4-7.

The full-time Committeemen perform no work for Caterpillar. Cir. App. at 173-74, 176-79, 183-90, 617-21. Instead, they perform functions exclusively for the Union. *Id.* They take direction only from the Union and perform their duties exclusively for the benefit of the Union and its members. *Id.* Caterpillar exercises no control over the manner or means by which they perform their duties. *Id.* The Union, not Caterpillar, selects them as agents, determines their qualifications, assigns their duties, evaluates their performance, and determines their tenure. J.A. at 3-10; Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2-3, 4-7. Committeemen may perform their duties in plant-based Union offices or in Union offices away

¹ As discussed *infra*, every court and administrative body that to date has considered the issue, including the Third Circuit, has agreed that these full-time Committeemen are employees of the Union and are not employees of Caterpillar.

from the plants. J.A. at 13-18; Cir. App. at 183-84, 188. For example, the York full-time Committeemen's offices were located in the Local Union hall and on average the incumbent Chairman spent one day per week performing representational functions inside the plant. *Id.*

3. *The UAW Demand that Caterpillar Pay Wages and Benefits to Full-Time Union Officials.* In 1973, the UAW demanded that Caterpillar pay for certain of these full-time Union representatives. Cir. App. at 475-76, 503-04, 520, 539. After a strike over this and other issues, Caterpillar agreed to provide wages and benefits for the full-time Chairmen of the Grievance Committees, including York's. Cir. App. at 477, 542, 544. In 1979, Caterpillar agreed to the UAW's demand to provide wages and benefits to other full-time Committeemen and York's full-time Alternate Committeeman, currently a total of 29 UAW officials (hereinafter "full-time Committeemen"). Cir. App. at 167; J.A. at 3-10.

Under the terms of the most recent Central Agreement, full-time Committeemen "shall be considered to be on leave of absence" and "will be paid by the Company for his regular shift hours . . . that employees in his jurisdiction are scheduled to work."² J.A. at 14, 16-17. In addition, any full-time Committeemen who "spends at least 8 hours in a workweek exercising the privileges and/or performing the legitimate duties of his office as set forth above will receive an additional 6 hours pay." J.A. at 14, 17. Full-time Committeemen also were granted "the same coverage as though he was actively at work" for the purposes of the Non-

² The Company, however, is not required to pay for time spent in "negotiations," "vacations," "attendance at meetings or conventions not held in the Local Union office," or "any activity not directly related to the functions of his office." J.A. at 14, 17.

Contributory Pension, Group Insurance, and Supplemental Unemployment Benefit plans. J.A. at 15-17. As of 1991, Caterpillar payments to these full-time Union representatives had reached approximately \$1.8 million per year. Cir. App. at 167.

Such paid leave arrangements can continue indefinitely. Cir. App. at 168. Indeed, several Committeemen have spent more years on paid "leave of absence" than as active employees and some have retired from Caterpillar while on paid "leave." *Id.* Such full-time leaves of absence with pay are without precedent for rank-and-file Caterpillar employees. Thus, while short absences by active employees to go on holiday, attend funerals, testify at trials, perform one's "weekend warrior" military reserve duty, or spend a "bonus day off" earned by good attendance are paid,³ employees who go on leave of absence as provided for under Article 14 for "military leave,"⁴ "disability leave," "Peace Corps leave," "maternity leave," or "government or union leave" are not

³ Section 15.1 provides for a "paid absence allowance" (12 to 50 hours per year based upon length of service or seniority date); Section 15.2 addresses holiday pay (11 specified days per year); Section 15.3 deals with employees summoned to jury duty or subpoenaed as witnesses; Section 15.4 deals with temporary military service (such as two-week National Guard camp or emergency call up); 15.5 deals with bereavement pay (up to 24 consecutive hours of work over 4 defined days per incident). Indeed 15.6 grants "Attendance Bonus" credits by which an employee can earn additional paid time off by virtue of his regular good attendance. J.A. at 38-42; UAW's Statement of Material Facts to Which Defendants Contend There is No Genuine Issue to be Tried, Exh. A (Articles 15.1, 15.2, 15.6).

⁴ Thus, for example, the labor contract itself recognizes the distinction between a *leave of absence* for long-term military service which is *unpaid*, see Section 14.7, and a short-term absence for temporary military service under Section 15.4 for which the employee is not docked. J.A. at 35-36, 40-41.

compensated. Thereunder, "[a]ll leaves of absence shall be without pay, except as expressly provided elsewhere in this Agreement . . ." J.A. at 35. Consequently, none of these types of leaves, including analogous leaves to serve in public office and even Union leaves for rank-and-file members, except leaves for these full-time Committeemen, are paid.⁵ J.A. at 36-37.

4. *The 1991-92 Negotiations.* In 1991, the UAW gave notice that it proposed to renegotiate the Central Agreement. Complaint, ¶ 14; Amended Answers, ¶ 14. Among its proposed changes, it demanded that the pay for certain full-time Committeemen be increased to 54 hours per week, plus shift premium at the highest labor grade rate, regardless of prior classification. Cir. App. at 167-68. After Caterpillar rejected this and other demands, the Union terminated the Central Agreement and undertook a strike. Complaint, ¶ 14; Amended Answers, ¶ 14; Cir. App. at 140-41. The strike was "recessed" in April 1992 without conclusion of a new agreement. *Id.* at 141.

In October, 1992, still without a negotiated agreement, Caterpillar advised the Union that it would not continue to

⁵ The disability and pregnancy leave provisions of Article 14 do provide for the possibility of "benefit payments" but only insurance payments under the Group Insurance Plan. J.A. at 34. Disability leave is available for the period of actual disability, in no event exceeding two years. *Id.* at 33-34. Whether any insurance benefit payments are received during the disability leave is a function of the Group Insurance Plan. *Id.* Their respective eligibility provisions are *not* coextensive. An employee eligible for a disability leave may nevertheless not qualify for disability payments under the insurance plan. *Id.* While the period of pregnancy is treated as a disability and, thus is eligible for insurance payments, maternity (childcare) leave is also unpaid. *Id.* at 33-35.

pay full-time union officials until a new agreement, lawfully providing for such payments, was negotiated.⁶ J.A. at 48-53.

5. *The UAW's Unfair Labor Practice Charges and Caterpillar's Declaratory Judgment Action.* In response, the UAW filed charges on November 17, 1992 with the NLRB, alleging violations of sections 8(a)(1), (3) and (5) of the Act. Cir. App. at 124; UAW's Reply to Caterpillar's Opposition to Motion to Stay Proceedings, Exh. 1. The General Counsel issued a limited complaint on December 30, 1992. Cir. App. at 123-34.

On December 22, 1992, Caterpillar filed this declaratory judgment suit in the U.S. District Court for the Middle District of Pennsylvania and advised the NLRB that it was reserving to the federal courts the issue of the legality of the payments under section 302. Cir. App. at 144-45; Caterpillar's Brief in Opp. to NLRB's Motion to Intervene, Exh. A, ¶ 14.

In the NLRB proceeding, the Board's General Counsel and the UAW contended Caterpillar had failed and refused to bargain with the Union before it ceased providing wages and benefits for the Committeemen in violation of section 8(a)(5) of the NLRA. Cir. App. at 123-34, 145. Caterpillar denied that it had failed to meet any obligations under section 8(a)(5) to bargain over the suspension of the wage subsidy but also defended on the ground, *inter alia*, that continued provision of wages and benefits for the Committeemen constituted unlawful discrimination against employees who chose to refrain from Union activities in violation of sections 8(a)(3) and 8(b)(2) of the NLRA. NLRB's Reply

⁶ Caterpillar did not discontinue its no docking of the pay of regular active employees serving as stewards and part-time committeemen. J.A. at 49.

to Caterpillar's Opp. to Motion to Intervene, Attachment A at pp. 18-19; UAW's Opp. to Caterpillar's Motion for Reconsideration, Attachment 2 at pp. 141-45. As it had previously advised, Caterpillar expressly reserved the section 302 issue for resolution by the federal court as the forum designated to hear such matters under section 302(e). *Id.*; Cir. App. at 144-45.

6. *The Findings of the NLRB's Administrative Law Judge.* On January 3, 1995, the NLRB administrative law judge issued a Decision and Recommended Order dismissing the alleged unfair labor practice complaints. Pet. App. at 139. Likening the Committeemen to assistant business agents in the construction and retail food industries, the ALJ found the Committeemen performed no productive work for Caterpillar in exchange for the payments and Caterpillar had no control over the manner or means by which they performed their Union duties. Cir. App. at 141-43. They worked for the Union, were responsible only to the Union for their work product and answered only to the Union, and it was the Union, not Caterpillar, which determined their tenure. *Id.* Given those facts, as well as other facts present in that case, the ALJ found the payments violated sections 8(a)(3) and 8(b)(2) of the NLRA and, accordingly, a refusal to pay them could not constitute a violation of section 8(a)(5). *Id.* at 146-47. The ALJ also observed, but found it "unnecessary" to rule, that the payments "raise[d] a serious question under Section 302." *Id.* at 145.

7. *The District Court's Ruling.* After Caterpillar brought this action, the NLRB moved to intervene and to stay the proceedings pending resolution of its unfair labor practice complaints against Caterpillar. Cir. App. at 101. The Union also moved for a stay. *Id.* The District Court denied the NLRB's motions but granted the Union's. Cir. App. at 111. Following the issuance of the ALJ's ruling, which remains

pending before the Board on exceptions, the District Court lifted its stay and both parties moved for summary judgment. Pet App. at 51a; Cir. App. at 569.

The District Court granted summary judgment for Caterpillar. Pet. App. at 63a. The court found that the Committeemen were not current employees of the Company because Caterpillar did not exercise sufficient control over them and that they performed their duties for the direct benefit of the Union. *Id.* at 56a-60a. The District Court applied the plain language of section 302, as previously interpreted and construed by the Third Circuit in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (CA3), *cert. denied*, 479 U.S. 932 (1986), and held the payments violated section 302. Pet. App. at 60a-62a.

8. *The Third Circuit's Ruling.* On appeal, the Third Circuit, hearing the case *sua sponte en banc*, overruled *Trailways* and reversed the District Court. It held payments of wages to full-time Union Committeemen lawful as "expanded 'no-docking' provisions" where they are "contained in the collective bargaining agreement on which each rank-and-file employee has the opportunity to vote." Pet. App. at 1a-12a. Judges Mansmann, Greenberg, and Alito dissented. Judge Mansmann declared that

[i]n suggesting that 'innocuous, bargained-for, and fully disclosed payment' . . . should be lawful, the majority has placed its own policy objectives above plain language The plain language . . . is supported by the legislative history and purpose of the exception and the majority's conclusion is at odds with important federal policy.

Id. at 12a-30a.

SUMMARY OF ARGUMENT

Consider the following scenario: During collective bargaining—which undoubtedly no longer occurs in the proverbial “smoke-filled room”—union leaders offer to reduce their demand for a pay raise for workers to a level the employer has signaled it may be prepared to accept. Concurrently, the leaders continue to propose that the employer agree to pay the wages of full-time union officers who leave the employer to become union representatives—a demand so far resisted by management. No one explicitly mentions a *quid pro quo*. The parties quickly reach an accord on these and numerous other proposed terms. At the union hall, the agreement is approved by a voting majority of the union members in attendance. Can the parties lawfully make that deal?

A majority of the Third Circuit reversed its existing precedent to embrace such transactions because, in its view, such payments are “innocuous,” “bargained for,” and “fully disclosed.” Pet. App. at 8a. Caterpillar respectfully contends that, in attempting to engraft such non-textual criteria onto the explicit text of section 302, the court placed its own policy objectives above those of Congress.

The plain language of section 302 makes it unlawful to “agree to pay” money or anything of value to a union representative. Section 302(c)(1), which allows payments to an employee or former employee, “as compensation for” or “by reason of” “*his service as an employee*,” only permits the employer to pay what is due to the employee *in spite of, not because of*, his position as a union official. It does not allow the employer and the union to “cut a deal,” memorialized in a collective bargaining agreement or on the back of an envelope, for the employer to pay the wages of the union officials representing his employees, regardless of whether the union official once worked for the payor.

The legislative history of section 302 confirms that Congress only sought to exempt money due to the employee or former employee “on account of wages actually earned by him.” In so doing, Congress, far from being only concerned with “noxious” acts of actual bribery or extortion, also acted prophylactically to avoid any potential conflicts of interest for union representatives and to maintain both labor’s *financial independence from management and financial dependence upon the dues of its members*.

That such payments were agreed to in the “give and take” of the collective bargaining process is only cause for *heightened* anxiety. Congress was not merely worried about “back-door deals.” On the contrary, Congress was expressly concerned with agreements reached *in* collective bargaining which *would* provide for indirect funding of unions through “diversions” to union coffers of wages earned by employees.

To argue, as does organized labor, that the wages of these union officials can be considered a “fringe benefit” earned by *their* past employment is sophistry. To contend that the parties may transform these payments for *current service as a union agent* into payments “by reason of” past “*service as an employee*” by simply declaring so in an agreement renders section 302(c)(1) a nullity. In reality, it is a union subsidy funded by all other *employees’* current service and, as the Third Circuit majority itself observed, *employees’* reduced wages.

As to the significance of “full disclosure,” whatever that may mean, it is an illusion which is never required in principle, let alone found, in the hurly-burly of collective bargaining. Moreover, corrosive practices risking the growth of conflicting interests, undue influence, and the loss of a proper balance of financial independence from management and dependence upon members are no less risky because members approve of them, *even* with their

vision clear, however shortsighted. Congress made these judgments; it did not cede them to the parties or union members.

Organized labor's attempt to dress up full-time wages to full-time union officials as mere "expanded no-docking policies" is a disguise. There are real and significant legal, practical, and economic differences between "not docking" a regular worker, who during the work day confers with the employer over the terms of employment on his own behalf or on behalf of a fellow worker, and a full-time union agent no longer employed by the employer.

The proviso to section 8(a)(2) of the NLRA does permit "employees" to "confer with [the employer] during working hours without loss of time or pay." 29 U.S.C. §158(a)(2). While the explicit requirement of section 302(c)(1) that any payment be for "service as an employee" may be read to permit this narrow practice, it warrants no further allowance. It most certainly does not require that section 302 be rendered nugatory by reading its substantive requirement that payments only be for "service as an employee" out of the statute.

Full-time union agents are no longer employees of the employer. Perhaps even more importantly, they are now full-time employees of an organization supposed to be separate and independent of the employer. On a practical level, an appreciation of the distinction between regular-worker representatives and full-time union officers must include recognition that in the ordinary course, the latter have substantially more authority and stand in oversight of the former. While this difference may or may not be a matter of degree, most serious legal distinctions do involve matters of degree.

Finally, on the economic level, the regular worker may reasonably be said to earn by his own labors the accom-

modation that he not be docked time or pay to meet with his employer. But as the Third Circuit majority itself recognized, the full-time paid leave for full-time union agents is in reality earned not by his labor but is funded by the reduced wages of every rank-and-file worker, member and non-member. As such, the former case is a *no-docking* policy, the latter case a massive *wage-docking* scheme.

ARGUMENT

I. EMPLOYER PAYMENTS TO FULL-TIME UNION REPRESENTATIVES CONTRAVENE THE PLAIN LANGUAGE AND PURPOSES OF SECTION 302

The text and legislative history of section 302 plainly show that it was designed to strictly limit the circumstances under which money could pass from employers to unions, their agents, or trust funds under their control. Congress generally banned the transfer of anything of value from management to labor. With illegality as the default rule, Congress then authorized a few narrow types of employer payments by expressly exempting them from the general ban. This prohibit-and-exempt approach allowed Congress to police labor-management relations by specifying with precision which employer payments it would permit and under what conditions. The payments at issue here do not come within any of the statutory exceptions. On the contrary, they represent some of the very evils Congress sought to address.

A. The General Ban of Section 302 Was Enacted to Protect Labor-Management Relations From the Corrosive Effects that Payments to Full-Time Union Representatives Present

The general ban on employer payments, contained in section 302(a) and (b) of the LMRA, unambiguously prohib-

its an employer from paying the wages of full-time union representatives. Section 302(a)(1) forbids an employer

to pay . . . or agree to pay . . . any money or other thing of value . . . to any representative of any of his employees.

29 U.S.C. § 186(a)(1) (1994). Section 302(b)(1) establishes a "reciprocal" ban, *Arroyo v. United States*, 359 U.S. 419, 423 (1959), applicable to union representatives who "receive[] or accept, or agree to receive or accept," payments forbidden by subsection (a). 29 U.S.C. § 186(b)(1) (1994). This Court held long ago that the "broad prohibition" of section 302 bans employer payments to individuals, such as grievance representatives, "who represent employees in their relations with the employers." *United States v. Ryan*, 350 U.S. 299, 305, 307 (1956).

Although no one has disputed that the payments at issue here come within this broad prohibition, the Third Circuit majority failed to acknowledge the full panoply of purposes served by the ban. Conceding that "[o]n the face of § 302(a)" the payments "would appear to be unlawful," Pet. App. at 5a, the majority nevertheless decided that because the payments were, in its view, "innocuous, bargained-for and fully disclosed," Pet. App. at 8a, they did not present the kind of "bribery, extortion," or "other corrupt practices conducted in secret" that Congress sought to prevent when it enacted section 302. Pet. App. at 12a. This myopic view of section 302 distorted the majority's interpretation of it.

Even if the majority thought the payments were "innocuous" in comparison to bribery and extortion, it erred in concluding that they did not implicate concerns underlying section 302. The Third Circuit itself had previously observed in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (CA3), *cert. denied*, 479 U.S. 932

(1986), that although payments made to union representatives who are former employees

may not at first blush be the kinds of payments thought to lead to corruption of union officials, *the potential for such corruption, or at least the appearance of it, nevertheless remains.*

Id. at 108 (emphasis added).⁷

Indeed, Congress created a broad, *malum prohibitum* restriction, "which outlaws all payments, with stated exceptions, between employer and representative." *Ryan*, 350 U.S. at 305; *see also* Pet. App. at 18a (Mansmann, J., dissenting) ("Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management."). If section 302 were limited to bribery, extortion, and corruption, it would do little more than duplicate state criminal laws, a result this Court has expressly rejected. *Arroyo*, 359 U.S. at 425; *cf., e.g., Knapp v. Schweitzer*, 357 U.S. 371, 372 (1958) (involving state grand jury investigation of bribery of labor representatives, conspiracy, and extortion). As the prohibition itself suggests, then, the concerns of Congress were broader.

⁷ Similarly, the Second Circuit has reasoned that section 302 "covers gifts, however trifling and *innocuous*," because

Congress may well have wished to put a stop to the practice, even on occasions inconsiderable and harmless in themselves, rather than to make verbal distinctions that would be troublesome in application.

United States v. Ryan, 232 F.2d 481, 483 (CA2 1956) (emphasis added), *on remand from* 350 U.S. 299.

The legislative history of section 302⁸ confirms that Congress intended to erect a firm financial barrier preventing an employer from making payments to a union or its agents. *See, e.g.*, 92 CONG. REC. 4,891 (1946) ("[T]he [provision] prohibits payments . . . to labor representatives and labor organizations, but in no manner does it prohibit . . . payment[s] . . . to employees directly." (statement of Senator Byrd)).

In addition to preventing bribery, extortion, and secret deals, this financial barrier serves at least three other functions. First, it helps to preserve the independence of labor from management, a fundamental tenet of American labor policy. As this Court has observed,

[t]he entire process of collective bargaining is structured and regulated on the assumption that "[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest."

General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 394 (1982) (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960)).

Federal labor law seeks to "ensure the integrity" of the collective bargaining system "by preventing both management and labor's representatives from being coerced in the

⁸ This Court has recognized the legislative history of the 1946 Case bill, H.R. 4908, 79th Cong. (1946), as a legitimate source in interpreting section 302 because a provision added to the bill by the so-called Byrd amendment contained very similar language. *See Arroyo*, 359 U.S. at 425-26 & n.6; *Ryan*, 350 U.S. at 304-05. In fact, the only difference between the Byrd amendment and section 302(a), (b), and (c)(1), as originally enacted, was the phrasing of the interstate commerce nexus. Compare H.R. 4908, § 8(a)-(c)(1), reprinted in 92 CONG. REC. 5,521 (1946) with LMRA § 302(a)(c)(1), Pub. L. No. 101, 61 Stat. 136, 157 (1947).

performance of their official duties," including arrangements that give an employer "leverage over the manner in which the [labor] official performs his union duties." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 704-05 (1983); accord *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part) (calling "the dividing line between management and labor . . . fundamental to the industrial philosophy of the labor laws in this country"). Section 8(a)(2) of the National Labor Relations Act, for example, makes it an unfair labor practice for an employer to "dominate," "interfere with," or "contribute financial support to" unions. 29 U.S.C. § 158(a)(2) (1994). This Court has recognized section 302 as another mechanism that "prohibits employers from compromising the independence of labor unions." *General Building Contractors*, 458 U.S. at 394.

Labor-management independence has been a recurring theme in federal labor law, from early resistance to "company unions," *see, e.g.*, *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939), to recent controversies over joint labor-management committees, *see, e.g.*, *Electromation, Inc.*, 309 NLRB 990 (1992), *enf'd*, 35 F.3d 1148 (CA7 1994); *cf. NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). The Third Circuit itself has noted the "inherently adversarial relationship" between labor and management. *Trailways*, 785 F.2d at 108 (construing section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (1994)).

Not only does the financial barrier help to prevent employer control of unions, it also helps to ensure that control of the purse strings of labor organizations remains firmly in the hands of the union members themselves. Financial dependence upon those represented by unions, as well as financial independence from management, must be preserved. A key concern of the proponents of section 302 was

the *diversion* to unions or their agents of money that employers might otherwise have paid to workers as wages. See S. REP. NO. 105, 80th Cong. at 52 (1947) (identifying purpose of section 302 as restricting authority of union leaders to "divert" employee wages to unions (supplemental views)), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 458 (1985).⁹ As a result, any money flowing to a union or its agents must pass through the hands of rank-and-file workers in the form of wages for their service as employees.

Suggesting that a union should fund its activities from membership dues, Senator Taft recognized why union leaders might prefer a direct employer subsidy:

[The coal miners] might say to the operators, "Add 7 percent to the pay roll of every man, and agree to check off 7 percent into a fund." . . . Of course, . . . the employees . . . would know that the union was taking 7 percent of their pay away from them: therefore, the union leaders do not want it.

92 CONG. REC. 5,339-40 (1946). Section 302 counteracts the tendency of unions to prefer employer subsidies by substituting a dues approach in part because it keeps union organizations financially dependent on their rank-and-file members.¹⁰ See LMRA § 302(c)(4), 29 U.S.C. § 186(c)(4)

⁹ See also 92 CONG. REC. 5428 (1946) ("It prohibits taking money that has been earned by the employees themselves and paying it to a union." (statement of Senator Taft)).

¹⁰ Employers too are far from without self-interested motive. As was the case here, paying union officer salaries and withholding pay during periods of hard bargaining can be used as leverage. This dispute arose when Caterpillar withheld union Committeemen pay to gain leverage in the labor negotiations. Cir. App. at 135-36, 168-69.

(1994) (requiring individual written and revocable authorization of employee for union dues check-off).¹¹

Finally, the financial barrier that section 302 erects was designed in part to keep union representatives free of even potentially conflicting interests. *United States v. Phillips*, 19 F.3d 1565, 1574 (CA11 1994), cert. denied, 514 U.S. 1003, and cert. denied sub nom. *USX Corp. v. United States*, 514 U.S. 1003 (1995); see *Costello v. Lipsitz*, 547 F.2d 1267, 1273 (CA5) (calling section 302 "prophylactic" measure), cert. denied, 434 U.S. 829 (1977).¹² The proponents of section 302 repeatedly made this point. Senator Taft, for example, asserted that

once we permit an agent to obtain money for his own use, or for any purpose, it is affirmatively a dubious practice, an immoral practice, and unless it is used for purposes which are properly defined, it should not be permitted.

92 CONG. REC. 5,466 (1946). Likewise, Senator Hatch compared employer payments to union representatives with gifts to an attorney from an adverse party. 92 CONG. REC. 5,428 (1946).¹³

¹¹ Senator Ball also expressed concern that union leaders might "perpetuate their power over the employees" and suppress dissent among members by selectively withholding benefits from a union-controlled welfare fund made up of employer payments diverted from employee wages. 92 CONG. REC. 5,345-46 (1946) (wondering whether coal miner who publicly disagreed with John L. Lewis would ever receive benefits from union welfare fund).

¹² As Judge Mansmann correctly noted in dissent below, "[t]he payments at issue . . . create a conflict of interest for union negotiators who may agree to reduced benefits for the employees in exchange for financial support for the union." Pet. App. at 18a.

¹³ Senator Hoey also warned that such payments would "destroy[]" the "effectiveness" of union representatives. 92 CONG. (continued...)

The payments at issue here threaten these interests. They potentially undermine the independence of labor by feeding the Union an annual subsidy of nearly \$2 million, Cir. App. at 167, and by that amount lessen the Union's dependence on its members, whose control is weakened as a result. The Union's demand that these payments be raised to 54 hours per week at the highest employee salary grade, *id.* at 167-68, increased the problem of wage diversion. Moreover, the Union's demand that payments be continued even after the contract expired—when members could cease their direct financial support by withdrawing from the Union—exacerbated the erosion of the members' right to cease their financial support. Cir. App. at 123-34.

B. Section 302(c)(1) Allows Payments Only if Owed in Spite of, Not Because of, Service as a Union Representative

The clear prohibition of section 302(a) and (b) notwithstanding, unions have been pushing the lower courts for over a decade to authorize these arrangements, and the Third Circuit majority has at long last given them *carte blanche*. The vehicle chosen to carry this weighty uphill load, however, lacks the statutory horsepower.

Section 302(c)(1), on its face, simply accounts for the reality that employees may divide their time between service as a union representative for their coworkers and service as a regular worker for the company, and that full-time union representatives are often drawn from among the ranks of the employer's workforce. Congress had to make

¹³ (...continued)

REC. 5,429 (1946). As Senator Overton quipped, "[t]he representatives of organized labor should be, like Caesar's wife, above suspicion." 92 CONG. REC. 5,181 (1946).

some provision for part-time representatives, who are entitled to wages for their service as regular workers, and for full-time representatives, who, as former employees, may be owed money for earned vacation time, severance pay, monthly pension payments, or the like. Section 302(c)(1) adjusts the ban on employer payments with respect to these individuals by continuing the prohibition as to their union activity but permitting employers to pay them for service as an *employee* "in spite of," not "because of" their ongoing service as a union representative. Pet. App. at 14a-15a (Mannsmann, J., dissenting). In other words, these individuals may be paid for service rendered while wearing a hard hat, but not for service rendered while wearing a union cap.

Organized labor is trying to exploit Congress' desire to draft this exception broadly enough to cover the various kinds of remuneration for services as an employee. The lower courts have generally agreed that the phrase "compensation for" refers to *wages*, while "by reason of" refers to non-wage *fringe benefits*. See *Phillips*, 19 F.3d at 1575; *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (CA2 1986) [hereinafter *BASF I*]. But labor has tried to wedge wage and benefit payments to union officials into section 302(c)(1) by labeling them a fringe benefit payable "by reason of" the full-time union representative's prior service as a regular worker.

Assuming that *wages* can even be considered *fringe benefits* payable "by reason of" an individual's "service as an employee,"¹⁴ the central question is what does this nexus

¹⁴ An immediate problem with this application of section 302(c)(1) is that the payments at issue here are wages—direct compensation for services as a union official. J.A. at 14-15, 16-17. Because the payments at issue are wages (*i.e.* compensation for (continued...))

requirement mean? As detailed in the petition for certiorari, this question has divided the courts of appeals, which have formulated approximately four different standards. Pet. at 10-19. In the Second and Fifth Circuits, "by reason of" means but-for causation, at least with reference to "no docking" policies applicable to current employees. See *BASF I*, 791 F.2d at 1049; *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 855 (CA5 1986) [hereinafter *BASF II*]. In the Seventh Circuit, it means that payments are "in some way motivated by" past service as an employee. *Toth v. USX Corp.*, 883 F.2d 1297, 1304 (CA7), cert. denied, 493 U.S. 994 (1989). In the Eleventh Circuit, it means—as the Third Circuit once said—that payments must be in exchange for "services actually rendered" by the individual when he or she was an employee of the company. *Phillips*, 19 F.3d at 1575; *Trailways*, 785 F.2d at 106. Now, the Third Circuit has broadly read the phrase to apply to any payments that the parties simply agree to label as remuneration for services as an employee. Pet. App. 10a-12a; see Part II, *infra*.

The Third Circuit got it right the first time. *Trailways* gave section 302(c)(1) the only sensible construction—one

¹⁴ (...continued)

services) and not fringe benefits, the "by reason of" language is simply inapposite.

The members of Congress who discussed section 302 seemed to believe that the "compensation for" language applied to hourly wages and that the "by reason of" language applied to remuneration for services actually rendered as an employee, but not calculated on a strict hourly basis. Senator Pepper, for instance, repeatedly expressed the view that the phrase "as compensation for, or by reason of, . . . service as an employee" applied to "wages or salaries." *E.g.* 92 CONG. REC. 5,073 (1946); accord *id.* at 5,336 ("[I]f the employer paid wages or pays salaries to the employee, neither the employer nor the employee would be guilty of violating the law.").

based on the provision's plain language, supported by its legislative history, and consistent with fundamental principles of federal labor policy.¹⁵ According to *Trailways*, "the statute contemplates payments to former employees for past services actually rendered by those former employees while they were employees of the company." 785 F.2d at 106 (emphases adjusted). The court there properly concluded that continuing pension contributions for benefits in recognition of current service as a union representative are not made in exchange for a representative's past service rendered as an employee.¹⁶

¹⁵ Similarly, in *Phillips*, the Eleventh Circuit adopted a sensible nexus requirement drawn from *Trailways*. The court held that "all payments from an employer to a union official must relate to services actually rendered by the employee." 19 F.3d at 1575 (emphasis added). In other words,

a payment given to a former employee must be for services he rendered while he was an employee to qualify for the exception. A payment given to a former employee for present or future services, which by definition could not be "as compensation for" or "by reason of" his "service as an employee," would violate the plain language of the exception and would be exactly the type of conflict-tainted payment that Congress designed the Taft-Hartley Act to prevent.

Id. (emphases added).

¹⁶ *Trailways* shows an additional risk of a broader construction of section 302(c)(1). There, the union was seeking to use section 302(c)(1) to justify payments to a pension fund because the payments did not meet the requirements of section 302(c)(5), which allows payments to pension funds only for the sole benefit of employees, not former employees. 29 U.S.C. § 186(c)(5) (1994); *Trailways*, 785 F.2d at 106-08. In *Trailways*, the Third Circuit refused to allow section 302(c)(1) to become a general catch-all provision for parties who did not want to comply with the restrictions imposed under other provisions of section 302. In this case, however, the Third Circuit majority ignored the conflict

(continued...)

This common-sense approach gives section 302(c)(1) bright lines and makes it workable. It limits the permissible payments to compensation or fringe benefits provided to employees in payment for actual services rendered to the employer.

Other interpretations, such as those in *BASF I* as well as *Toth*, tend to link payments not to the actual rendition of services but to the mere historical fact that an individual happened to have once worked for an employer. In *Toth*, for instance, the Seventh Circuit held that the "by reason of" language could include payments "motivated by" an employer's desire to induce its employees to become union representatives so it would not have to deal with outsiders or to promote goodwill between the employer and a representative by commemorating the representative's past service. See 883 F.2d at 1301. These vague rationalizations for payments have nothing to do with the value of the actual services rendered to the employer by the former employee during her prior employment. Even the Seventh Circuit itself recognized that allowing such open-ended "justifications" for payments to officials threatened to undermine section 302. *Id.* at 1303-04.¹⁷

¹⁶ (...continued)

between section 302(c)(5) and its interpretation of section 302(c)(1). The Departments of Justice and Labor as amicus noted this problem but felt it could be left to future cases. See Amended Br. of the United States as Amicus Curiae at 28, n.14. It cannot.

¹⁷ Even the Seventh Circuit, however, opined that "fulltime pay for no service cannot reasonably be said to be compensation 'by reason of' service as an employee." 883 F.2d at 1305; accord *BASF I*, 791 F.2d at 1050 (denying that employer could simply "put a union official on its payroll while assigning him no work."); *BASF II*, 798 F.2d at 856 n.4 (same).

The legislative history of section 302(c)(1) supports the *Trailways* interpretation. Senator Ball, who sponsored the amendment that became section 302, explained that section 302(c)(1) made an exception to the general prohibition only with regard to

money due a representative who is an employee or a former employee of the employer, on account of wages actually earned by him.

93 CONG. REC. 4,805 (daily ed. May 7, 1947), reprinted in 2 LEG. HIST. LMRA, *supra*, at 1304 (emphasis added). Likewise, Senator Byrd, who sponsored section 302's predecessor in 1946, explained the forerunner of section 302(c)(1) as follows:

In some instances an employee will also be a labor representative, and there should be no prohibition from paying him his compensation for, or by reason of, his services as an employee.

92 CONG. REC. 4,891 (1946).

Simple common sense reinforces *Trailways*' straightforward interpretation of the statute. It does not set up an irrational distinction between union representatives who are former employees and those who were never employees of the employer. An irrational distinction *does* arise when one acknowledges that an employer may not pay the wages of a union official who is not a former employee but contends that an employer may pay the *same wages* to a full-time union representative who was its former employee for any period. Yet it cannot reasonably be the case, nor is there any historical indication, that Congress feared bribery, corruption, or the diversion of worker funds *only* where union representatives had never been employed by the employer. Is a stranger *more* likely than a former employee to be unduly influenced or corrupted by an employer? Is union financial independence from the employer or

union financial dependence on its dues-paying members any less undermined by payments to union officials who were once employed by the payor?¹⁸

In *Ryan*, this Court held that the term "representative" as used in section 302(a) is not limited to labor organizations themselves but includes individual union agents. 350 U.S. at 307. The Court reasoned that excluding "[p]ayments made directly to union officials" from section 302 "would frustrate the primary intent of Congress," *id.* at 305, would allow the ban to be "easily evaded," *id.*, and would "reduce the legislation to a practical nullity," *id.* at 306. Whether eroding the statute by exempting individual union agents occurs under section 302(a), as in *Ryan*, or section 302(c)(1), as here, the result is the same.

II. INCLUSION OF AGREEMENT TO PAY WAGES OF FULL-TIME UNION OFFICERS IN A COLLECTIVE BARGAINING AGREEMENT "APPROVED BY THE RANK AND FILE" DOES NOT EXEMPT SUCH PAYMENTS FROM THE PROHIBITION OF SECTION 302

In holding that the wages of full-time union representatives were payable "by reason of" past "service as an employee," the Third Circuit majority "reach[ed] this conclusion because the payments arose, not out of some 'back-door deal' with the union but out of the collective bargaining agreement itself." Pet. App. at 10a. Because the payments were "bargained-for" and, supposedly as a result, were fully "disclosed" to the rank-and-file, the majority thought there would be no harm "to the collective bargain-

¹⁸ This Court is undoubtedly aware and may take judicial notice that many, if not most, union officials at all levels of a union hierarchy started off as employees of some employer whose workers were represented by that union.

ing process" in permitting them. Pet. App. at 12a. Section 302, however, is aimed at protecting not only "the collective bargaining process" but also protecting the *purposes* of federal labor policy *from the collective bargaining process itself*, and agreements at cross purposes therewith. Although the majority offered several rationales to support its conclusion, none bears close scrutiny.

A. The Contention that "Service as an Employee" is Defined by the Terms of a Labor Contract is Circular and Contradicts the Text and Legislative History of Section 302

The Third Circuit majority's first rationale is definitional. It supposed that inclusion in the collective bargaining agreement of a provision authorizing employer payments to union officials is significant because

the contract . . . by defining the basis for the payments, speaks directly to the question posed by the statute as to whether the payments *are* "compensation for, or by reason of . . . service as an employee."

Pet. App. at 11a-12a (emphasis added). In other words, employer payments to full-time union representatives are payable "by reason of . . . service as an employee" if the parties merely agree they are in a collective bargaining agreement. They are because the parties *say* they are.

This reasoning is hopelessly circular. Section 302(a)(1) explicitly states that it shall be unlawful to "agree to pay" any money to any employee representative. 29 U.S.C. § 186(a)(1) (1994). Proponents of the above logic, nevertheless, would exempt from that prohibition any payments that an employer has *agreed* to pay in a collective bargaining agreement. They would, thus, prohibit an employer from agreeing to pay money it has not agreed to pay. But

nothing in the plain language of section 302 even hints that the provision of wages or benefits to union officials, if provided through a labor contract, is somehow exempt from the general ban on employer payments.¹⁹

If Congress had wanted, it "could easily have written an exception for payments by employers to union representatives pursuant to collective bargaining agreement." Pet. App. at 19a (Mansmann, J., dissenting). Indeed, in *other* provisions of section 302(c) Congress proved quite capable of explicitly exempting various extremely specific types of payments, such as payments made pursuant to "judgment[s]," LMRA § 302(c)(2), 29 U.S.C. § 186(c)(2) (1994), "award of an arbitrator," *id.*, "settlement . . . of [a] claim," *id.*, "sale or purchase of an article," LMRA § 302(c)(3), 29 U.S.C. § 816(c)(3) (1994), and the like. Congress has, moreover, expressly exempted a variety of payments to jointly administered, employer-union trust funds for the sole and exclusive benefit of employees, provided that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1994) (emphasis added). There is no comparable exception for wage, benefit, or expense payments to union officials if "authorized in a collective bargaining agreement."²⁰

¹⁹ As Judge Mansmann put it: "If an agreement to pay is unlawful under section 302(a)(1), it is illogical to use the same agreement as a basis for finding that the resultant payment is lawful under section 302(c)(1). Pet. App. at 19a.

²⁰ In fact, one Senator suggested a revision that would draw a distinction between employer payments that were included in a collective bargaining agreement and those that were not. The revision, however, actually would have made *unlawful* only payments agreed to "in the course of collective bargaining." 92 CONG. REC. 4,897 (1946) (statement of Senator Overton).

Beyond the sheer circularity of this rationale, it conflates two categories that Congress intended to treat as mutually exclusive subjects of legislation: service as an employee and service as a union representative. What the Third Circuit majority, spurred on by the Union, has done is collapse the latter into the former, so that compensation for *service as a union representative* is transfigured into a "fringe benefit" payable "by reason of . . . service as an employee." No transformation ever really occurs, however, because the wage payments at issue are triggered only by, and are paid only for, *service as a union representative*. Whatever the parties or their agreement may say, the union representative is still being paid to be a union representative. This *ipso facto* logic, as Judge Mansmann noted, so "expands the exception . . . that the rule is rendered a nullity." Pet. App. at 20a.

B. The Contention That Payments to Union Officials Are Lawful if Funded by Wages Diverted from Employees Is Self-Refuting

To bolster its definitional argument, the Third Circuit majority offered another rationale that attempted to reconceptualize the payments at issue as a kind of "fringe benefit" accrued by an employee during his service as a regular worker. The majority supposed that because the payments were agreed to "in the bargaining process,"

every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.

Pet. App. at 10a. At core, this reasoning rests on the same circular logic as the majority's definitional theory: Every provision of a collective bargaining agreement is, *by defi-*

nition, part of the consideration paid to employees "by reason of" their services as employees. Why? Because the parties say so. If the agreement authorized the payment of wages to employees who become full-time union representatives, then the payments *must* be an employment benefit payable to them because of their service as an employee. See Pet. App. at 10a-11a. This contrivance, however, is rife with analytical flaws.

First, it glosses over the fact that the statutory language specifically authorizes employer payments to a union representative only "by reason of . . . his service as an employee," 29 U.S.C. § 186(c)(1) (1994), not by reason of the collective service of the employer's workforce as a whole. Yet the allegedly earned benefit is not tied to any particular quantum of individual service as an employee. A term of employment whereby an individual's service actually *earns* a paid leave of absence, however, reasonably would be expected to entail at least some durational relationship between length of service and length of paid leave, or some other principle of proportionality.²¹ Under the majority's analysis, however, an employee would be eligible to take a paid leave of absence to perform union activities for years or even decades based merely on his service as an employee for one month or one week. The parties could make such leave available, moreover, with any agreed upon level of income or benefit package.²²

²¹ Judge Mansmann notes this absence of proportionality and offers a number of examples which demonstrate that the incongruity of perceiving such leaves as a contingent benefit earned by the individual's service. See Pet. App. at 21a & n.6.

²² In fact, the bylaws of Local 786 merely require that members be in good standing for one year prior to nomination. Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 4-5. The UAW's contractual arrangement with Caterpillar contains no durational requirement. J.A. at 3-10, 13-18.

The reality behind this "fringe benefit" facade is that the union representative receiving the wages does not in any sense of the word "*earn*" or "*accrue*" the paid leave. Every other employee is "*earning*" it for him and is *funding* his salary by *reduced* wages. See Pet. App. at 39 (Alito, J. dissenting). The irony, of course, is that the Union and the court have sought to justify these payments as nothing but an "expanded no-docking" policy. In fact, this indefinite paid leave is a *massive wage-docking* policy. It docks the wages of regular workers in order to pay the wages of full-time union officials.

Such payments, therefore, contravene a core purpose of Congress in enacting section 302: preventing "*diversions*" of employee wages to union coffers or the pockets of union officials. See Part I.A., *supra*. By preventing payments from an employer to a union, Congress ensured that any union funding would come from dues-paying workers. As Senator Taft and others explained,

[t]he [provision] proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury or the union officers, except under the process of strict accountability.

S. REP. NO. 105, 80th Cong. at 52 (1947) (supplemental views), *reprinted in* 1 LEG. HIST. LMRA at 458; *accord* 92 CONG. REC. 5,340 (1946) ("This [provision] is aimed at one thing, namely, bypassing the employees by paying money directly to their representative, who is supposed to be bargaining for them." (statement of Senator Taft)).

Congress did not suggest that collective bargaining provided the desired "process of strict accountability." Indeed, Congress was specifically concerned that union negotiators, whether for evil purpose or even with good intentions,

might use the process of collective bargaining to divert to union or personal uses money that rightfully should have gone to the workers as wages. See 93 CONG. REC. 4,876 (daily ed. May 7, 1947) (statement of Senator Taft observing that restrictions must be placed on bargaining representatives, who should have "no right to obtain any personal advantage"), reprinted in 2 LEG. HIST. LMRA, *supra*, at 1311. Indeed, opponents of section 302 consistently and vigorously attacked section 302 for interfering with "free collective bargaining." S. REP. NO. 105, PT. 2, 80th Cong. at 23 (1947) (minority views), reprinted in 1 LEG. HIST. LMRA, *supra*, at 485; accord 93 CONG. REC. 4,806 (daily ed. May 7, 1947) (statement of Sen. Pepper) ("This is another one of those instances where it seems that certain individuals do not credit the union membership with any authority whatever over the selection of or the conduct of their own leaders."), reprinted in 2 LEG. HIST. LMRA, *supra*, at 1306.

The peculiar rationale behind this "fringe benefit" theory presents, therefore, the precise specter that Congress sought to banish. The reasoning of the Third Circuit majority has transformed a statutory evil into a reasoned justification.

This wage-diversion rationale also creates a basic conflict with another fundamental principle of federal labor law—the statutory right of individual employees to *refrain* from union membership. 29 U.S.C. § 157 (1994). Federal law allows states to enact "right-to-work" laws, which require employers and unions to maintain "open shops"—workplaces in which individual employees are free to work without mandatory union membership. 29 U.S.C. § 164(b) (1994); see, e.g., TENN. CODE ANN. § 50-1-201 (1995) ("It is unlawful for any person . . . to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join

or affiliate with any labor union or employee organization of any kind."). Under those laws, no employee may be forced to join a union or pay any union dues against her will. Even in states where "union shops" are lawful and membership is properly a condition of employment, employees may restrict their support of a union to core financial membership. *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988).²³

If the decision below is allowed to stand, labor contract negotiators can abridge these worker rights. Union leaders and, indeed, members can effectively force non-members—who are not entitled to hold union office or vote on the contract—to suffer a wage cut in order to subsidize the wages, benefits, and presumably even expenses of union officials. Such a provision in a collective bargaining agreement would allow union members to spread the costs of union activities to all employees, including non-members, rather than placing those costs only on those who choose to join the union and pay its dues. Thus, the reasoning below threatens to drive open shops into irrelevance and nullify both state right-to-work laws which guarantee non-union workers the right to shield their wages from union tax collectors, see *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 102 (1963), and this Court's *Beck*

²³ Under *Beck*, an employee may pay reduced union dues that cover only the costs of collective bargaining and related activities; unions may not force employees to subsidize activities unrelated to bargaining. 487 U.S. at 762-63. This Court explained that Congress has allowed dues collection from all employees in a union shop to avoid the "free rider" problem, *id.* at 773, but sought to "limit[] the expenditures that may properly be charged to nonmembers . . . to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.'" *Id.* at 752 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 447-48 (1984)).

doctrine under which an employee can limit financial support to matters directly attributable the collective bargaining process. As Senator Ball pointed out, section 302 "covers *not only union members* who presumably have some voice in the selection of the business agent, *but all employees*." 93 CONG. REC. 4,883 (daily ed. May 8, 1947) (emphasis added), *reprinted in* 2 LEG. HIST. LMRA, *supra*, at 1322.²⁴

Finally, the exchange of "reduced wages and benefits" for union officer wages or benefits would seem to acknowledge or envision the very type of potential conflict of interest with which Congress was concerned. Presumably, Congress did not worry about those employers, if any, who would pay union officials out of a sense of largesse, expecting nothing in return. Instead, it is exactly the risk that union officials might "implicitly" (to use the Third Circuit majority's own term) agree to lower wages, less substantial increases, narrower benefit entitlements or a "break here and there" on disputed issues in return for payments that Congress sought to avoid, not embrace.

C. The Contention that Contract Ratification Is an Adequate Safeguard Contradicts the Reality and Congressional Opinion of Collective Bargaining

The Third Circuit majority offers a third rationale for allowing payments agreed to in collective bargaining agreements. It states that the payments

are contained in the collective bargaining agreement on which each rank-and-file employee has the opportunity to vote. Thus, the officials receiving the

²⁴ As articulated by the Third Circuit majority, there is nothing in this so-called collective bargaining exception that would limit payments only to union officials for contract-related activities. See Part II-C, *infra*.

payments can be held accountable to the membership.

Pet. App. at 12a.

This thinking is best categorized as a profession of faith in the collective bargaining process and the ability of the "rank and file" to adequately police payments between its employer and the union's officers. Such sentiments, however, actually are at odds with the views upon which Congress acted.²⁵ Section 302 generated intense debate and controversy precisely because it placed substantive limits upon the terms that employer and union negotiators could agree to include in collective bargaining agreements.²⁶ Opponents vigorously decried section 302 as interfering with free collective bargaining. See Part II-B, *supra*.

Moreover, such blind faith simply is not well founded. Labor agreements are complex documents and the tradeoffs anything but apparent. What has been noted about "laws and sausages" is also true of labor agreements: the process

²⁵ See, e.g., 93 CONG. REC. 4,883 (daily ed. May 8, 1947) (colloquy between Senators Ball and Barkely), *reprinted in* 2 NLRB, LEG. HIST. LMRA, *supra*, at 1321-22.

²⁶ Senator Taft, who led the movement to enact the Labor Management Relations Act in 1947, insisted that

certainly there should be some restriction on the right of those who bargain collectively for the employees . . . as to how far they can take the money earned by the employees and use it for union purposes without restriction.

93 CONG. REC. 4,876 (daily ed. May 8, 1947), *reprinted in* 2 LEG. HIST. LMRA, *supra*, at 1311. In fact, the sponsor of the amendment that became section 302 expressed his outrage that in some instances "unions have even relinquished *wage demands* in order to secure" a particular form of employer payment. 93 CONG. REC. 4,805 (daily ed. May 7, 1947) (statement of Senator Ball) (emphasis added), *reprinted in* 2 LEG. HIST. LMRA, *supra*, at 1305.

by which they are made is not necessarily a pretty sight. See *Community Nutrition Institute v. Block*, 749 F.2d 50, 51 (CA DC 1984). What tradeoffs led to which concessions often defy description. No current law mandates a process of any, let alone "full," disclosure, or the issuance of explanatory "impact statements" setting out the various economic tradeoffs. Members do not have access to bargaining information on the same basis as their representatives and they have no statutory right to such information. *Fulk v. United Transportation Union*, 81 F.3d 733, 736 (CA7 1996); *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1972-76 (CA9 1992). Given that, it is axiomatic that employers have no way to know, and no recognized right to know, whether or to what extent the various "quid pro quos" have been explained. Nor do all "rank and file" employees in the unit get to vote. Only members in good standing vote. In fact, no principle of federal law even mandates that union members must be permitted to ratify by vote unless the union's constitution so provides. See, e.g., *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1111 (CA6 1986) (*en banc*); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 666 (CA7 1992).

In recognition of the potential dangers, even the current Departments of Labor and Justice, as *amici* below, were not prepared to endorse such unfettered deference to the collective bargaining process. Although seeking reversal of the District Court, they urged remand so that the court could determine whether the facts met a number of non-textual limitations they proposed to engraft onto the Union's collective bargaining exception. The Departments of Justice and Labor were concerned about cases in which payments were "clearly so incommensurate with [a union representative's] former employment as not to qualify as payments 'in [sic] compensation for or by reason of' that employment."

Amend. Br. for the United States as Amicus Curiae at 27 (quoting *Toth*, 883 F.2d at 1305). In addition, they suggested it was relevant whether the paid union representative happened to be an individual who had "worked in the bargaining unit" and had been "elected to his position by his fellow employees" and is receiving pay that is "dependent on and limited to [the representative's] continuing role in the grievance process." *Id.* at 24. Finally, they called for courts to "closely scrutinize[]" cases in which the payments are made "to an individual who negotiates the terms of those payments" or "to an individual who has not worked for the company in his regular job for an extended period" and "is unlikely to return to such work." *Id.* at 28.

The Departments' obvious reservations and their proposed limitations vividly anticipate the very type of mischief that may be unleashed in allowing unions to negotiate wages and benefits for their officials and agents where the sole criteria are "whether the persons who receive the payments have ever been in the 'service' of the employer," *id.* at 15, and whether the payment is included in a collective bargaining agreement. The fears implicit in the United States' proposals are certainly well warranted. The problem, as Judge Alito noted in dissent (and even the Third Circuit majority apparently conceded), is that none of these limitations can be "tease[d]" from the statutory language or its legislative history. Pet. App. at 44a. If the collective bargaining agreement defines what is to be deemed "'consideration for services rendered,'" *id.* at 11a (quoting *Trailways*, 785 F.2d at 109 (Becker, J., dissenting)), then definitional power lies with the parties. It matters not what those terms are. It matters not how those terms made their way into the agreement and it matters not how those terms were approved as long as the process complies with other federal laws applicable to the negotiation and formation of

labor agreements. Wages and benefits may be paid in whatever amount is negotiated, to any former employee regardless of length of service or prior position, selected by any means to fill any union office regardless of function. The agreement need only be approved in accordance with that particular union's duly adopted constitution.²⁷

The point is the Third Circuit's analysis leaves little if anything for section 302(a) to prohibit that cannot be permitted by inclusion in a "section 302(c)(1) agreement". The government's reservations and the obvious unacceptability of this state of affairs under the plain language of section 302 should give substantial pause even to the most ardent believer in collective bargaining and unionism. If the salaries of union officials need to be funded through their members' wages, the obvious answer is to negotiate wages that allow members to pay dues and fund their union directly themselves, retaining to themselves ultimate control of their union's finances and the salaries of the officials elected or appointed to serve them. In short, both the elaborate construct and implicit tradeoffs conjured up by the Union to justify perpetuation of this growing subsidy and the further emasculation of section 302(a) as well as the Departments' proposed remedial scheme of vague "rebuttable presumptions", "reasonable relationship", "special

²⁷ Indeed, given the Third Circuit's rationale that the wages of union officials are actually benefits to the members, one can readily envision an extension of the reasoning to abandon the requirement that the official have *ever* been an employee. One need simply hypothesize that the payment of his or her wages or provision of his or her benefits is a "fringe benefit" to the employees who receive free (or lower cost) union representation not unlike an employer-paid group legal services plan. Judge Mansmann recognizes this possible extension of section 302(c)(1) given the majority's rationale and the absurdity of the result. Pet. App. at 21a.

scrutiny" and "open negotiation" tests are utterly unnecessary to provide a means for the funding of union services.

III. PAYING THE WAGES OF FULL-TIME UNION OFFICIALS GOES WELL BEYOND THE LIMITED "NO DOCKING" PRACTICES ARGUABLY PERMITTED UNDER SECTION 302

The rule of section 302 is unambiguous: employer payments to anyone—whether employee, former employee, or stranger—for service as a union representative is prohibited.

Although this case does not require resolution of the issue, consistent construction of section 302 with congressional intent as expressed in the proviso to section 8(a)(2) of the NLRA would suggest that it is appropriate to recognize a limited "no docking" exception to allow "employees to confer with [their employer] during working hours without loss of time or pay." 29 U.S.C. § 158(a)(2) (1994). Consistent construction of section 302 and the narrow proviso to section 8(a)(2), however, most assuredly does not necessitate or justify paying the wages of full-time union officials. Neither the plain language nor legislative history of *either provision* even suggest such an expansive result. Moreover, there are very real and significant legal, practical, and economic distinctions between regular employees who may assist fellow workers as needed during the workday and full-time union officials.

A. The Language and Legislative History of Sections 8(a)(2) and 302 Support Limited "No Docking" of "Time and Pay" of Employee But Not Paying Wages for Full-Time Union Agents

Although section 302(c)(1) allows an employer to pay a current, active employee only for her "service as an employee," the proviso to section 8(a)(2) contains a narrow ex-

ception declaring that "an employer shall not be prohibited from permitting *employees* to confer with him during working hours *without loss of time or pay*." 29 U.S.C. § 158(a)(2) (1994) (emphases added). Consistent construction of the two provisions would warrant including time spent by an *employee* conferring with his employer during working hours concerning the terms of employment within the concept of "service as an employee."

In these circumstances, a court would be justified in applying the "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); accord *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 & nn.7 & 8 (1976); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Ginsberg & Son, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring in part and concurring in judgment).

Application of this rule, however, does not open section 302 to the kind of payments to full-time union representatives at issue here. Though stated in no uncertain terms, the exception that the section 8(a)(2) proviso creates is quite narrow. Its text allows only an *employee* to *confer* with her *employer*, presumably about terms and conditions of employment or related grievances, *during working hours* without suffering any *loss of time or pay*. This last requirement, that the employee should not suffer any *loss* of pay, clearly contemplates only payments to an individual who has a regular job with the employer during working hours for which the employer is already paying him compensation for service as a regular employee and which *time* and *pay* is not to be lost. Indeed, the very concept of not *docking* an individual's pay is nonsensical with respect to individuals who no longer perform any regular work for an employer.

The legislative history confirms this narrow construction. From its inception in 1935, the NLRA's proponents resisted attempts to broaden the proviso. Many interest groups sought to change the language of the proviso as proposed (and as ultimately adopted) in order to allow, *inter alia*, employers to pay employees to serve as union representatives. Some even wanted employers to be able to agree to pay the bargaining expenses of the union.²⁸ Senator Wagner, the bill's sponsor and chief architect, resisted all attempts to broaden the proviso on grounds important to the current controversy:

I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other.

Labor Disputes Act, Hearings Before the House Comm. on Labor on H.R. 6288, 74th Cong. 15 (1935) (statement of Senator Wagner), reprinted in 2 LEG. HIST. NLRA, *supra*, at 2489.²⁹ The legislative history, therefore, specifically re-

²⁸ See *Hearings Before the Senate Comm. on Education and Labor on S. 1958, Part 3*, 74th Cong. 443-45 (1935) [hereinafter *Hearings on S. 1958*] (statement of Robert T. Caldwell, Attorney, American Rolling Mill Co.), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 1829-31 (1985) [hereinafter LEG. HIST. NLRA]; *id.* at 601-02 (statement of John Thomas Smith, Vice President, General Motors Co.), reprinted in 2 LEG. HIST. NLRA, *supra*, at 1987-88; *id.* at 655-56 (statement of Clifford U. Cartwright, Secretary-Chairman, Employees' Representation Plan of the Oklahoma Pipe Line Co.), reprinted in 2 LEG. HIST. NLRA, *supra*, at 2041-42; *id.* at 714-15 (statement of William H. Davis, Chairman, Special Comm. on the Government and Labor of the Twentieth Century Fund, Inc.), reprinted in 2 LEG. HIST. NLRA, *supra*, at 2100-01.

²⁹ Senator Wagner never wavered in this position. Thus, for example, in hearings he observed as follows to one witness:

(continued...)

pudiates any suggestion that the proviso to section 8(a)(2) was intended to allow employer payments to union representatives who were *not* current, active employees. A 1935 Senate print analyzing the language of the NLRA explained the removal of the phrase "local representative" from the proviso as follows:

If such representatives are not employees, then they would not be compensated in any case. If they are employees, there is no need for a confusing additional term.

STAFF OF SENATE COMM. ON EDUCATION AND LABOR, 74TH CONG., MEMORANDUM COMPARING S. 1958 WITH THE BILL REPORTED AS A SUBSTITUTE FOR S. 2926 at 27 (Comm. Print 1935) (emphasis added), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 1353.

In construing section 302 as it relates to not docking the pay of regular employees who also serve as shop stewards, a number of courts have made reference to both the language and case law interpreting section 8(a)(2). In *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970), for instance, the court noted the proviso to section 8(a)(2) but did not find it very helpful in

²⁹ (...continued)

I believe you and I will agree on this proposition, that you could not be a very effective representative of the workers if you were paid for the services you rendered for the workers, by the employer with whom you are to bargain.

Hearings on S. 1958, supra, at 655 (statement of Cartwright), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2041; *accord id.* ("To me, I just feel that you cannot be a very loyal representative of the workers if you are paid by the other side."), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2041; *see also* S. REP. NO. 573, 74th Cong. 10-11 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2310.

applying section 302. The case involved an arrangement under which employees who were also union representatives received a fixed number of hours of employer pay (either four or six) each month to cover time spent in grievance meetings. The court rejected the employer's claim that the policy was unlawful under section 302 because the grievance meetings were often briefer than the allotted "no docking" period, so that the employee-representatives were receiving some payments for time *not* conferring with management. The court simply concluded that section 8(a)(2) did not address the situation, suggesting that the court gave section 8(a)(2) a quite narrow interpretation. The decision to permit the payments essentially rested on the *de minimis* nature of the payments. *Id.* at 461.

Although *Wyman Gordon* was hardly a sweeping endorsement of unlimited "no docking" policies under section 302, its result has been expanded. In *BASF I*, for instance, the issue was not four hours a month, but four hours a *day* to a regular, albeit part-time, union official. Yet the Second Circuit upheld a "no docking" scheme allowing employee-representatives to spend half of their working hours on union activities. There, the court also cited section 8(a)(2) but, unlike *Wyman Gordon*, used it as a justification for upholding the "no docking" scheme at issue. The court concluded that the legislative history of an unsuccessful attempt in 1947 to amend section 8(a)(2) showed that Congress had no objection to extending "no docking" policies beyond mere conferring with management. 791 F.2d at 1051-53.³⁰ Based in part on that analysis, the court read

³⁰ The court misread the legislative history. The attempt to amend section 8(a)(2) to permit greater leeway for "no docking" policies occurred in the House. *See* H. REP. NO. 245, 80th Cong. at 28-29 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 319-20. But the Senate's refusal to amend the provision prevailed in (continued...)

section 302(c)(1) to permit four hours of union pay per day.³¹ Nevertheless, the court explicitly limited its holding to *current* employees, the only ones to whom “no docking” policies “have relevance.” *Id.* at 1049 n.1; *see also Phillips*, 19 F.3d at 1575 n.18; Pet. App. at 23a-26a (Mansmann, J., dissenting).

However broadly the proviso to section 8(a)(2) should be interpreted, then, nothing in its language or legislative history permits either it or section 302(c)(1) to be expanded to include payments to individuals who are no longer even employees of the employer. The proviso to section 8(a)(2)

³⁰ (...continued)

the conference committee, *see* H. CONF. REP. NO. 510, 80th Cong. at 40-41 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 544-45, and the Senate generally approved of the NLRB’s strict enforcement of section 8(a)(2). *See* S. REP. NO. 105, 80th Cong. at 12 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 418.

³¹ *BASF I* may well have gone too far. The “no docking” policy approved there permitted employee-representatives to receive employer pay for much more than mere conferences with management because it generally allowed them to “conduct[] union business.” *See* 791 F.2d at 1047 (quoting collective bargaining agreement). Furthermore, these individuals were entitled to a fixed four hours of union time per day, regardless of the need for any grievance services. *Id.* Thus, the individuals were not simply available on an *ad hoc*, as-needed basis. Instead, they were regular, albeit part-time, union agents, more akin to the dual capacity agents/employees addressed in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 116 S.Ct. 450 (1995).

BASF II further expanded the flawed result in *BASF I*. In the second case, arising out of a different facility, the employer tried to limit a new union chairman to union activities only on an *ad hoc*, as-needed basis, because his predecessor had spent the four paid hours of release time for purely personal affairs. Nevertheless, the Fifth Circuit followed *BASF I* and refused to find the fixed, four hour policy unlawful under section 302. 798 F.2d at 856.

may warrant some indulgence when applying section 302 to active employees who perform representational services on the shop floor, when called upon to do so. But it certainly does not require a court to effectively read the substantive test of section 302(c)(1)—the requirement that pay relate to “service as an employee”—out of the statute altogether, reducing it to a mere requirement of a qualifying period of prior employment, however brief, which will justify subsequent compensation and benefits to union representatives for any duration that may be negotiated. If given that “spin,” Senator Wagner would hardly recognize the proviso he successfully fought to keep narrow.

B. There Are Substantial Legal, Practical and Economic Distinctions Between Limited “No Docking” of Current Employees Who, on Occasion, Perform Union Representational Services as Needed for Fellow Employees and Paying the Wages of Former Employees/Full-Time Union Officials Who Perform No Service for the Employer

The majority below placed heavy emphasis on its professed inability to see a distinction between employer “no docking” practices of the pay of current employees who perform a representational service as needed for fellow employees on the shop floor and what it described as “expanded ‘no-docking’ provisions” involved here. “[T]he nature of the absences and the payments made . . . is the same.” Pet. App. at 12a.

In failing to see any distinction, the court undertook no analysis of the legislative history of either section 8(a)(2) or section 302. Moreover, as the dissents noted, the court merely assumed, without analysis, that those courts which had approved “no docking” of current employees, including the regular part-timers in *BASF I*, were correct on the law.

Instead, the court embraced the Union's mathematical argument that there was no distinction between "granting four employees two hours per day of paid union leave" and "granting a single employee eight hours." Pet. App. at 10a.

In Caterpillar's view, however, the distinctions are real and substantial, if not immediately apparent to those focused merely on a quantity of hours.

First, equating a full-time official and employee of the union, who is charged with primary responsibility for performance of day-to-day union duties, with an employee of the employer who, like the civil defense volunteer, dons his union "hat" when needed, is unjustified. Even if it can be assumed *arguendo* that both can be subject to undue influence or that pay to both erodes the foundations of union financial independence, the union's full-time officials may be fairly presumed to stand in positions of greater authority, responsibility and power within the organization. Cir. App. at 177-78; Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2, 8. If the union as an organization acts, it most assuredly acts through these individuals. *Id.* In this case, the full-time committeemen had extensive duties not committed to stewards, including participation in the negotiations. Cir. App. at 180-81, 183-85, 601-02, 612-13, 626-30. While these varying levels of responsibility, influence and power may be matters of degree, serious legal controversies "almost always involve matters of degree and often degree of the nicest sort."³² The full-time union officials most certainly superintend the activities of the employee-representatives. Cir. App. 177-81.

³² Felix Frankfurter, *Sixth Annual Benjamin Cardozo Lecture: Some Reflections on the Reading of Statutes*, THE RECORD OF THE ASSOCIATION OF THE BAR OF NEW YORK, No. 6 (1947).

If the employee-representative is influenced by allowing him not to be docked in the same manner the employee he represents is not docked, at least the union's full-time officials, paid by *the members*, stand in oversight.

Second, there is an obvious legal distinction. It is as clear and well established in law as the distinction between an employee and a non-employee. The full-time union official, whether or not he *was* an employee of the employer, is not an employee of the payor.³³ More importantly in terms of

³³ The NLRB's administrative law judge, the District Court, and the Third Circuit majority as well as its dissenters uniformly held that the full-time committeemen are not current, active Caterpillar employees. This determination is amply supported by the evidence. For example, the administrative law judge found

there are indicators suggesting the [full-time committeemen] are really employees of the Union. They are responsible to the membership for their work product. [Caterpillar] has no control over the manner and means by which they perform their functions as representatives of the employees.

Pet. App. at 78a. The judge further found "the fact of the matter is that they perform no productive work for [Caterpillar]. They do perform work for the Union." *Id.*

Likewise, the District Court held Caterpillar did not exercise sufficient control over the full-time committeemen to classify them as its employees because the Company did not control the tasks they performed or the manner in which they performed them. Pet. App. at 57a-58a. Every member of the Third Circuit agreed that the full-time committeemen cannot be considered current employees of Caterpillar within the meaning of section 302(c)(1). Pet. App. at 7a-8a; *id.* at 13a (Mansmann, J., dissenting); *id.* at 31a-33a (Alito, J., dissenting). It found the full-time committeemen perform no work for Caterpillar's benefit. *Id.*; *cf. Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (CA6 1981) (holding full-time union representative to be employee of union, not employer); *United States v. Kaye*, 556 F.2d 855, 864-65 (CA7) (same), *cert. denied*, 434 U.S. 921 (1977).

the purposes of section 302, she is not just *not* an employee of the payor, she *is* an employee of the union, acting exclusively as its representative and agent.³⁴

In *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 116 S. Ct. 450 (1995), the Court deferred to the NLRB's conclusion that paid union organizers were employees within the meaning of the NLRA as consistent with the NLRA's purposes and common law principles. *Id.* at 453-55. The Court cited, *inter alia*, the definition of "employee" in Black's Law Dictionary as consistent with the NLRA:

a "person in the service of another under any contract of hire, express or implied, oral or written, *where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.*"

³⁴ In Caterpillar's case, the York Chairman, for example, did not even reside in the plant, visiting it instead only one day a week. Cir. App. at 174, 188-89. Union stewards and part-time committeemen, however, are current, active employees of Caterpillar who perform their representational functions on an *ad hoc* as needed basis, and then return to their regular production and maintenance jobs. J.A. at 44; Cir. App. at 166. Under Article 4.3 of the expired Central Agreement, such employees must obtain permission from their immediate supervisor before leaving their immediate work area to process a grievance and must present that pass to the supervisor of the area they wish to visit. J.A. at 12. Moreover, under Article 4.2, the amount of time they spend processing grievances may not be unreasonable. J.A. at 10-12.

In sharp contrast, the full-time committeemen are assigned no work by Caterpillar. Cir. App. at 187-88. They perform their duties at the union hall and are in the plant only one or one-and-a-half days per week. *Id.* at 188-89. Although assigned to the Labor Relations Department for payroll accounting purposes only, they are not supervised by Labor Relations, which merely approves their time sheets for payroll purposes. J.A. at 123-25; Cir. App. at 174-75, 187-88, 190.

516 U.S. at ___, 116 S. Ct. at 454 (quoting Black's Law Dictionary 525 (6th ed. 1990)) (emphasis added). Here, Caterpillar does not have the power or right to control or to direct how the full-time union officials perform their duties. The distinction is not between "4x2" versus "8x1"; the real distinction is between one who is an employee and one who has ceased to be an employee of one organization and has become the employee of another organization *where*, under the statutory scheme, the latter is supposed to be completely financially independent of the former.

The *third* distinction is revealed by the Third Circuit majority's own "reduced-wage" rationale. In the case of the current employee serving only when and as needed, and otherwise working for the employer, it is at least arguable that he provides valuable work which earns, by *his own service*, both his pay *and* the accommodation that it not be docked. In the case of the full-time union official, on leave for years or decades, the court was quite right in recognizing that, in the final analysis, his full-time salary is being earned and funded, *not* by his service, but by the reduced wages of everyone else—precisely the type of diversion of wages to the union that Congress sought to avoid. Here again, while this distinction may or may not be one of degree, it is an important degree, indeed.

CONCLUSION

The decision of the Third Circuit should be reversed, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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